Ebenezer Rail Car Services, Inc. *and* International UAW. Case 3–CA–21809

January 31, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On November 22, 1999, Administrative Law Judge Bruce D. Rosenstein issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] as modified, to modify his remedy, and to adopt the recommended Order as modified.

The judge found, and we agree, that the Respondent violated Section 8(a)(5) and (1) by laying off 10 employees without adequate notice to the Union and without affording the Union an opportunity to bargain over the layoff decision and the effects of that decision. Although the judge analyzed the 8(a)(5) violation under *Lapeer Foundry & Machine*, 289 NLRB 952 (1988), and its progeny,[3] his recommended remedy is couched in terms of a traditional make-whole remedy for the laid-off employees. We shall modify that remedy,[4] to make it consistent with that ordered in *Lapeer*.[5]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Ebenezer Rail Car Services, Inc., West Seneca, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

1. Substitute the following for paragraphs 2(a) and (b).

"(a) On request, bargain with the Union concerning the decision to lay off employees on March 5, 1999, and the effects of that decision.

"(b) Reinstate and make whole those employees laid off on March 5, 1999, for any loss of pay or other employment benefits suffered as a result of its unlawful conduct in the manner set forth in the amended remedy portion of this decision."

2. Substitute the attached notice for that of the administrative law judge.

MEMBER HURTGEN, dissenting in part.

I agree with my colleagues, except in one respect.

After the results of the election were announced on February 26, 1999,[1] employee Jim Piazza shook hands with Manager Jeffrey Grainer. Piazza stated, "It could be worse." According to Piazza, Grainer replied, "You are going to regret this all year." The General Counsel alleged, and my colleagues agree, that Grainer's statement was threatening and coercive and violated Section 8(a)(1) of the Act. I disagree.

The statement, "you are going to regret this all year" cannot be viewed in isolation. It must be viewed in the context of other statements made by Grainer to all employees, including Piazza. Those statements include Grainer's comments about his past experiences with unions and his opinion, based thereon, that unions were not good for employees. Thus, the quoted statement and the

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We agree with the judge that the Respondent violated Sec. 8(a)(1) when Manager Jeffrey Grainer told an employee, immediately after the announcement of the union election victory, that "[y]ou're going to regret this all year." *Maxwell Plum*, 256 NLRB 211 (1981). See also *Azalea Gardens Nursing Center*, 292 NLRB 683, 686 (1989) (statement that employees "would 'regret this day' clearly conveyed to them they could expect unspecified reprisal actions . . . for their having supported the Union"). Contrary to our dissenting colleague, we find that this statement is neither vague nor ambiguous. Further, we note that, in determining whether a statement by an employer violates Sec. 8(a)(1), or is protected by Sec. 8(c), the Board considers the totality of the relevant circumstances. See *Mediplex of Danbury*, 314 NLRB 470 (1994). Here, given the context and timing of Grainer's statement, and in light of the Respondent's other unlawful statements, we agree with the judge that this statement violates Sec. 8(a)(1).

[3] In agreeing with the judge's finding that the Respondent's decision to lay off employees was a mandatory subject of bargaining, we rely additionally on *Executive Cleaning*, 315 NLRB 227 fn. 5 (1994), and *Holmes & Narver,* 309 NLRB 146 (1992).

[4] It is well settled that Sec. 10(c) confers on the Board "broad discretionary" authority to fashion remedial awards. *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 216 (1964); also see *N.C. Coastal Motor Lines*, 219 NLRB 1009 (1975), enfd. 542 F.2d 637 (4th Cir. 1976) (no requirement that complaint allege a remedy). This authority extends to cases where, as here, neither the General Counsel nor the Union specifically excepted to the form of the judge's remedy. *Westpac Electric,* 321 NLRB 1322 (1996).

[5] Under *Lapeer*, the traditional and appropriate Board remedy for an unlawful unilateral layoff based on legitimate economic concerns includes ordering the employer to bargain over the layoff decision and the effects of that decision, reinstating the laid-off employees, and requiring the payment to the laid-off employees of full backpay, plus interest, for the duration of the layoff. *Lapeer*, supra, 289 NLRB at 955–956.

[1] The Union won the election.

related comments were protected by Section 8(c), which privileges "expressions of opinions which, however false or unsubstantiated, d[o] not rise to the level of interference, restraint, or coercion prohibited by Section 8(a)(1) of the Act."[2] In any event, the quoted statement was ambiguous and far too vague to constitute a threat.[3]

The instant case is readily distinguishable from *Maxwell's Plum*, 256 NLRB 211, 214, 216 (1981), cited by the judge. In that case, Hilda Caldas, the laundry supervisor, told employee Holmes that she would regret joining the union. In that case, unlike here, Caldas immediately prefaced her "regret" remark by creating an unlawful impression that employees' union activities were under surveillance. Then, Caldas underscored her "regret" remark by indicating that Roy Fox, the back-of-the-house manager, would talk further to the employees about their joining the union. When he did speak to employees later that day, they were notified about the unlawful shutdown of the laundry operations and their unlawful discharges. Therefore, in *Maxwell's Plum*, unlike the instant case, the context for Supervisor Caldas' "regret" remark removed any doubt or ambiguity as to the threatening nature of her statement. Similarly, *Azalea Gardens*, 292 NLRB 683 (1989), is distinguishable because it involved the unlawful impression of surveillance and occurred simultaneously with two unlawful threats by the same manager.

Based on the above, I would dismiss the subject allegation.[4]

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten our employees by stating that if the employees selected the Union as their collective-bargaining representative we would treat the employees as badly as we treat our vendors, threaten our employees that if they select the Union as their collective-bargaining representative we could not control any employee layoffs, threaten our employees that if they select the Union as their collective-bargaining representative we would not have to keep our commitment not to lay off employees, or threaten our employees that during collective-bargaining negotiations with the Union we would refuse future work for fear of strikes and threaten our employees that, all year, they would regret having selected the Union as their collective-bargaining representative.

WE WILL NOT, without first giving notice and affording International UAW the opportunity to bargain in good faith over our decision and its effects, lay off our employees in the following unit:

All full-time and regular part-time production and maintenance employees employed by the Respondent at its 1005 Indian Church Road, West Seneca, New York location; excluding all business office clerical employees, sales employees, managerial employees, guards, all other employees, all professional employees and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union concerning the decision to lay off employees on March 5, 1999, and the effects of that decision.

WE WILL reinstate and make whole those employees whom we unilaterally laid off on March 5, 1999, for any loss of pay or other employment benefits suffered as a result of our unlawful conduct in the manner set forth in the amended remedy of the Board's decision

EBENEZER RAIL CAR SERVICES, INC.

Beth Mattimore, Esq., for the General Counsel.
Joseph L. Braccio, Esq., of Buffalo, New York, for the Respondent-Employer.

DECISION

STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried before me on July 19, 20, and 21, 1999,[1] in Buffalo, New York, pursuant to a complaint and notice of hearing

[2] See *Camvac International*, 288 NLRB 816, 820 (1988), quoting from *North Kingstown Nursing Care Center*, 244 NLRB 54, 65 (1979).

[3] *The Standard Products Co.,* 281 NLRB 141, 148 (1986), enfd. in relevant part 824 F.2d 291 (4th Cir. 1987) ("[The] statement standing alone . . . is somewhat vague, subject to interpretation by the listener . . . [S]tanding alone it does not rise to the level of a threat that would violate Section 8(a)(1)."

[4] See, e.g., *Restaurant Horikawa*, 260 NLRB 197, 207 (1982).

[1] All dates are in 1999 unless otherwise indicated.

(the complaint) issued by the Acting Regional Director for Region 3 of the National Labor Relations Board (the Board) on April 30. In addition, the Regional Director for Region 3, issued an amendment to the complaint on June 30. The complaint, based on an original and a first and second amended charge filed by International UAW (the Charging Party or the Union), alleges that Ebenezer Rail Car Services, Inc. (the Respondent or Employer), has engaged in certain violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying that it had committed any violations of the Act.

Issues

The complaint alleges that the Respondent discriminatorily laid off 12 employees,[2] and also refused to bargain with the Union over the conduct and the effects of the layoff. In addition, the complaint alleges five independent violations of Section 8(a)(1) of the Act by making threatening statements.

On the entire record,[3] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation engaged in the repair of railroad cars, with an office and place of business in West Seneca, New York, where it annually purchased and received at its facility, goods and materials valued in excess of $50,000 directly from points outside the State of New York. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Employer commenced its business operation approximately 19 years ago with current president, Jeffrey Schmarje, starting the business from the ground up. Respondent's sole and primary function is to sell its labor to refurbish railroad freight cars owned and operated by major railroad and private companies. Due to the arduous nature of the work, the Employer has historically had a high turnover rate of employees. For example, in 1997, 106 employees were hired with the average number employed at any one time being between 55 and 70 (R. Exh. 2). Likewise, the employment complement for 1998 and the first 6 months of 1999, show similar figures (R. Exhs. 3 and 4).

The Union commenced an organizational campaign in late 1998, and a number of employees became actively involved. In early January 1999, Schmarje held a meeting with all employees to apprise them that they were behind on a large program order,[4] and it was necessary to pick up the work. One of the employees at the meeting inquired whether there was any additional program work scheduled after the current program was completed. Schmarje said, "[W]e don't have anything scheduled and we are probably going to have to lay off." No mention of the number of employees impacted or a target date was discussed. On January 15, Schmarje held a meeting with all employees to disabuse them of a rumor running rampant at the facility that a layoff was imminent that could reach senior employees who receive 3 weeks' vacation. On January 20, the Union sent a certified letter to Schmarje requesting recognition. On January 22, Chief Executive Officer Robert Rude held a meeting with all employees. Schmarje was not present at the meeting, and the employees vented their numerous frustrations to Rude. In order to address some of their concerns, Schmarje held a meeting with all employees on January 28, wherein he apologized for past problems and promised to address future employee concerns.

On February 4, another meeting was held with all employees. Schmarje addressed the topic of what a union meant to their relationship and expressed his opinion that either party could win, lose, or draw if they went into negotiations. Schmarje stressed that he has worked side-by-side with the majority of the employees and he did not know how things would go with the interjection of a third party. Additional employee meetings to address Respondent's position about the Union took place on February 11, 18, and 24. The election campaign culminated on February 26, when the Union won a representation election conducted by the Board. On March 5, the Employer laid off 11 employees primarily based on seniority. On March15, the Union was certified as the exclusive collective-bargaining representative of the employees in the unit.

B. The 8(a)(1) Violations

1. Allegations concerning Jeffery Schmarje

The General Counsel alleges in paragraph 6(a) of the complaint that about February 1, Schmarje threatened its employees by stating that if the employees selected the Union as their collective-bargaining representative, Respondent would treat the employees as badly as it treats its vendors.

The general test applied to determine whether employer statements violate Section 8(a)(1) of the Act is "whether the employer engaged in conduct which reasonably tends to interfere with, restrain, or coerce employees in the free exercise of rights under the Act." *NLRB v. Almet, Inc.,* 987 F.2d 445 (7th Cir. 1983); *Reeves Bros.,* 320 NLRB 1082 (1996).

Before addressing the specific allegations involving Schmarje, it became apparent to me after hearing the testimony that he has a paternal feeling for his business. Indeed, Schmarje told one of his employees that the Union made him feel like getting a divorce or losing a child through death. Schmarje testified that he felt betrayed when the Union came on the scene since he built the Company from the ground up and has given

[2] At the commencement of the hearing, the General Counsel amended the complaint to remove the name of Daniel Schneider as an alleged discriminatee in pars. 7 and 9.

[3] The Respondent's unopposed motion to correct the transcript, dated September 21, is granted and received in evidence as R. Exh. 18.

[4] Program orders are a large volume of freight cars that have a high amount of repetitive work.

much to its development and success. He did not want a third party to intervene and act as a wedge between the Company and his employees.

Employee's Robert Schosek, Joseph Rivera, and Jim Piazza all testified that during one of the February 1999 campaign meetings, Schmarje apprised the first-shift employees that he is a tough negotiator and he treats his vendors like "shit." Schmarje further told the employees that if the Union came in, he intends to treat them like a business and treat them like his vendors.

Schmarje admitted that during the February 11 employee meeting, he apprised his employees that he is a tough negotiator and treats his vendors badly. He might have used the word "shit" but does not specifically recall. However, Schmarje's notes of the February 11 meeting, confirm that the topic of vendors was discussed with the employees (R. Exh. 11).

Based on the above, I credit the testimony of the three employees that when Schmarje discussed the topic of vendors, he told the employees that he was a tough negotiator and treated his vendors like "shit." He further stated that if the Union came into the facility, he intended to treat them just like his vendors.

Under these circumstances, I find that such a statement made to employees tends to coerce them in the exercise of their Section 7 rights and that it violates Section 8(a)(1) of the Act. See *Polymer Prints,* 281 NLRB 431, 433 (1986).

In regard to paragraphs 6(b) and (c) of the complaint, the General Counsel alleges that Schmarje informed employees at the February 1999 meetings, that Respondent would not lay off employees even if business was slow but told them that if they selected the Union, he could not control or keep his promise not to lay off employees.

Employees Daniel Brunelli, Robert Schosek, Carl Conrow, and Jim Piazza all testified that during one or two of the employee meetings held in February 1999, Schmarje told them that he made a commitment to the men to keep them working even if work was slow. Schmarje further stated that if the Union came in, he did not know if he could keep such a commitment and there possibly could be layoffs. Piazza also testified that Schmarje always said that he did not hire to lay off.

Schmarje testified that he couched all of his discussions regarding layoffs in terms of negotiations. In this regard, he asserts that he told the employees that he could not predict what would happen in negotiations about layoffs. He did not deny, however, specifically making the statements attributed to him by the three employees.

Under these circumstances, I tend to credit the testimony of the four employees. It has a ring of truth to it, and did not appear to be contrived. Indeed, the employees' pretrial affidavits given to the Board shortly after Schmarje conducted the February 1999 employee meetings, contained the statements. Moreover, as discussed above, I conclude that Schmarje felt threatened and betrayed by the presence of the Union, and saw all his hard work in building the Company disappearing before his eyes. Accordingly, and particularly noting that Schmarje did not specifically deny that he made the statements, I conclude that he did tell employees that he could not control or keep his commitment not to lay off employees if the Union came into the facility. Therefore, I find that such statements tend to interfere with and coerce employees in the exercise of their guaranteed rights, and conclude that Respondent violated Section 8(a)(1) of the Act when Schmarje made the statements alleged in paragraphs 6(b) and (c) of the complaint.

With respect to paragraph 6(d) of the complaint, the General Counsel alleges that Schmarje told employees that during collective-bargaining negotiations with the Union, the Respondent would refuse future work for fear of strikes.

Employees Daniel Brunelli and Jim Piazza testified that during one of the February 1999 employee meetings, Schmarje told the employees that if the Union came in, he would refuse work from customers because he was afraid to tie up their equipment if there was a strike.

Schmarje admitted that he might have expressed his concern to the employees if customers' freight cars were on the property in case of a strike.

I am of the opinion that Schmarje did make the statement alleged in the complaint. Such a statement is consistent with the way Schmarje expressed his feelings about the Union both to employees during the meetings and in his testimony. Likewise, the employee's testimony was forthright and not evasive even under extensive cross-examination by Respondent's counsel.

Under these circumstances, I find that Schmarje made the statement that Respondent would refuse future work for fear of strikes. Accordingly, I conclude that Respondent violated Section 8(a)(1) of the Act.

2. Allegations concerning Jeffery Grainer

The General Counsel alleges in paragraph 6(e) of the complaint that about February 26, Respondent, by Jeffrey Grainer, threatened employees by stating that, all year, they would regret having selected the Union as their collective-bargaining representative.

Employee Jim Piazza testified that after the results of the election were announced on February 26, he was in the midst of shaking hands with Grainer and said, "it could be worse." Grainer said, "you are going to regret this all year."

Grainer admitted that while he was shaking hands with Piazza, he told him that, "you're going to regret having a Union in." Grainer attempted to explain that in making the statement to Piazza, he meant that in his opinion unions don't do anything for employees and during the course of the organizational campaign, he expressed his opinion to employees that union's were not good.

I find that such a statement, uttered immediately after the union's victory, was threatening and coercive. Accordingly and particularly noting that Grainer admitted making the statement, I find that it violates Section 8(a)(1) of the Act. See *Maxwell's Plum,* 256 NLRB 211, 214, 216 (1981).

C. The 8(a)(1) and (3) Violations

The General Counsel alleges in paragraph 7 of the complaint that about March 5, Respondent laid off 11 employees because they assisted the Union.[5]

In *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board

[5] The evidence disclosed that employee Heath Stuart was laid off on February 23, rather then March 5.

announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer decision. On such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399–403 (1983). In *Manno Electric,* 321 NLRB 278 fn. 12 (1996), the Board restated the test as follows. The General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity.

In regard to Heath Stuart, the General Counsel presented evidence that he was a union supporter because he had a bumper sticker on his car and on the day before he was laid off, he wore a union baseball cap to work. Additionally, the General Counsel argues that on January 21, in the presence of Foreman Tim Cartwright and Stuart, Foreman Thomas Jakubowski, while uttering a racial slur about Vietnamese employees, also stated that he was ready if the Union came into the facility.

Respondent argues that Stuart was laid off because of lack of work and the fact that he did not satisfactorily complete his probationary period. In this regard, Stuart was hired on November 3, 1998, and his first 30-day probationary period ended on December 3, 1998. Respondent extended his probationary status for another 60 days and when it was evident that Stuart was not working out, he was laid off on February 23. At no time during his employment did Stuart ever receive full-time benefits since he was still in his probationary period.

Although Stuart testified that supervisors observed him wearing his union baseball cap on February 22, he admitted that no one said anything to him about the cap. I conclude that while he wore the union baseball cap on February 22, before and after work and at lunch, there is no evidence that any Foreman observed or acknowledged the cap during any of these periods. Likewise, even if Jakubowski made the statement that he is ready for the Union, there is no evidence in the record that Jakubowski directed the comment at Stuart or that he was aware that Stuart supported the Union. Moreover, at the time the alleged statement was made on January 21, Stuart did not possess the UAW cap since he first received it at the union meeting on February 21.

Under these circumstances, and particularly noting that Schmarje apprised employees in early January 1999, that layoffs could be a possibility, I conclude that Respondent's reasons for the layoff withstand scrutiny. Thus, I find that Stuart would have been laid off on February 23, even in the absence of his union activities.

With respect to the remaining 10 employees that were laid-off on March 5, the General Counsel asserts that this was the first significant layoff at Respondent and there was plenty of work available for the employees to complete.[6] In this regard, a number of employees testified that the railroad tracks were full of cars to be repaired, employees were regularly working 10-hour days with scheduled Saturday overtime, and several Foreman apprised employees that as fast as the freight cars could be repaired there would be additional cars provided to work on. Additionally, the General Counsel argues that on March 26, Foreman Grainer told employee Blair McPherson that the layoffs will be the end of the second shift and they would not have happened except with what's going on.[7]

Respondent contends that the layoffs on March 5 took place for legitimate business reasons. In this regard, the Respondent notes that in early January 1999, Schmarje apprised the employees that they were behind in their work, that no other large work programs were scheduled and there might have to be a layoff. Additionally, Respondent asserts that in early February 1999, Schmarje went to Michigan to bid on repairing a large number of freight cars that represented a four or five million dollar job. On February 24, Respondent learned that it was not the successful bidder for this work.[8] Around this same time, the Respondent received its most recent income statement for the period ending February 28. That statement shows that for the last 4 months it had lost $362,013 (R. Exh. 14). Indeed, the Respondent found it necessary to extend its Bank line of credit from a maximum of $800,000 to $14 million in order to stay in business and meet expenditures during this period.

Schmarje met with the employees on March 1, and informed them that the company financial statements were bad and they did not receive the large program order that he had bid on. He further apprised the employees that the business was in bad shape and he would do whatever it would take to get the Company back to financial stability. Schmarje, after reviewing cost projections and other financial statements, independently made the decision to lay off between 10 and 14 employees on March 1. Schmarje consulted with his attorney, and they jointly decided to lay off 10 employees by seniority on close of business March 5.

I conclude that the General Counsel has made a strong showing that the Respondent was motivated by antiunion considerations in laying off 10 employees on March 5. In this regard, I previously found that prior to the layoff, Schmarje made a number of threatening statements to employees that show his feelings about the Union. Additionally, immediately after the representation election on February 26, Foreman Grainer told an employee that you are going to regret this all year, and the layoff took place only 5 workdays after the election.

The burden shifts to the Respondent to establish that the same action would have taken place even in the absence of the employees' protected conduct.

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[6] Although there were other slow periods that took place in prior years wherein Respondent permitted employees to work in makeshift jobs and did not layoff significant employees, it had never lost as much money in those years as in the present situation.

[7] McPherson admitted that the word "union" was never used.

[8] R. Exh. 17 shows that between January 8 and April 20, the Employer was actively seeking to obtain additional work. Only one small painting job was derived from these efforts.

I conclude that the Respondent would have effectuated the layoff on March 5, even if the employees had not engaged in protected conduct. In this regard, the income statements of the Respondent conclusively establish that it was hemorrhaging money, for a number of months prior to the layoff, without any relief in sight. Respondent took all reasonable efforts in order to obtain additional work but was rebuffed by its customers. It even convinced its lender to increase its line of credit an additional $600,000. I find that when Schmarje received the February 28 income statement, that reported continued bleeding of company resources, it was the breaking point that led him to follow through on his prior statement to employees that a layoff might have to occur. Indeed, that statement was made in early January 1999, before the filing of the January 20 demand for union recognition.

Under these circumstances, I find that Schmarje made the decision to lay off employees on March 1. Although he did not specifically tell employees of this decision at the March 1 meeting, he did apprise them that he would do whatever it would take to get the Company back to financial stability. Thus, I find that Schmarje made the decision to lay off employees for legitimate business reasons unrelated to union activities.

Accordingly, I recommend that the Section 8(a)(1) and (3) allegations in paragraph 7 of the complaint be dismissed.

D. The 8(a)(1) and (5) Violations

The General Counsel alleges in paragraph 9 of the complaint that about March 5, Respondent laid off 11 employees without prior notice to the Union and without affording the Union an opportunity to bargain with respect to this conduct and the effects of this conduct.

The evidence discloses that on March 1, Attorney Braccio left a telephone message for Union Organizer John Garvey that he needed to speak to him about a matter concerning the Respondent. Both Garvey and Braccio played "telephone tag" and were unable to confer until the afternoon of March 4, when Braccio informed Garvey that Respondent intended to lay off between 10 and 14 employees. Garvey informed Braccio that the layoffs should be negotiated and asked Braccio to talk to Assistant Union Regional Director Tom O'Donnell about the specifics of the layoff. Braccio then engaged O'Donnell in conversation about the layoffs. Braccio informed O'Donnell that the layoffs would be effective close of business on March 5, and would occur according to straight seniority with minor exceptions. O'Donnell told Braccio that we have to negotiate before the employees are laid off. Braccio told O'Donnell that he could meet towards the end of April 1999. O'Donnell then asked whether the layoff could be postponed and Braccio informed O'Donnell that it could not because Respondent was bleeding red ink. Braccio further informed O'Donnell that the layoff was based on economic necessity and Respondent would not give up on such a defense. O'Donnell then requested that negotiations over the layoff take place on March 5, but Braccio told him that his schedule did not permit it. O'Donnell further requested that negotiations take place on Monday but Braccio could not accommodate such a request due to a personal obligation. Braccio ended the conversation by informing O'Donnell that he would call him next week to schedule dates for negotiations over the layoff.

The complaint alleges, and Respondent admits, that on February 26, a representation election was conducted among employees in the unit and on March 15, the Union was certified as the exclusive collective-bargaining representative of the unit. Thus, the layoff of employees on March 5 took place between the election and the certification of the Union. The Board has held in *Consolidated Printers,* 305 NLRB 1061, 1067 (1992), that no unilateral changes may be made by an employer during the period of time between the results of the election and eventual certification. Here, there is no question that a change in conditions of employment took place on March 5, when the layoff of 10 employees occurred.

In the particular circumstances of this case, it must be determined whether the notice given the Union on the afternoon of March 4 was adequate enough to enable the Union to request and enter into negotiations over the conduct of the layoff and its effects.

The Board has consistently held that an employer's decision to lay off employees for economic reasons is a mandatory subject of bargaining and that an employer must provide notice to and bargain with the Union concerning the decision to lay off bargaining unit employees and the effects of that decision. *Plastonics, Inc.,* 312 NLRB 1045, 1048 (1993), *Adair Standish Corp.* 292 NLRB 890 (1989), enfd. in relevant part 912 F.2d 854 (6th Cir. 1990), and *Lapeer Foundry & Machine,* 289 NLRB 952 (1988). Here, the layoffs of the 10 employees were motivated by economic reasons, that is, the "bleeding of red ink," and not by any change in the scope and direction of the business. Compare *Bridon Cordage, Inc.* 329 NLRB 258 (1999).

The Board has held that the establishment of "compelling economic circumstances" may excuse a company's failure to bargain over a layoff decision, but that such an exception shall only apply in "extraordinary situations." *Lapeer Foundry,* supra. The only "extraordinary situation" that can be said to exist in this case is the cumulative loss of $362,013 as of February 28, a sum that was reached after successive loses since November 1998.

Given the fact that the loss of money continued since November 1998, I do not believe that Respondent has demonstrated that its situation should fall within the exception excusing the Employer's failure to bargain with the Union over the decision to layoff its employees. There is simply no showing of urgency or that immediate harm would result that would preclude taking time to bargain with the Union. Here, Schmarje informed his employees in early January 1999, that a layoff might be necessary and reached the decision for the March 5 layoff on March 1. Indeed, Schmarje informed his employees on March 1 that things were bad and that he would do whatever it would take to get the Company back up in financial shape. He did not, however, inform them or the Union on that date that he was planning on laying off 10 employees on March 5. Rather, it was not until the afternoon of March 4, that Braccio first told the Union that a layoff would take place on March 5. I conclude that Respondent could have informed the Union on March 1, that it intended to layoff employees on

March 5, which would have provided ample opportunity to complete negotiations before that time. Here, there was no legitimate explanation by Respondent why bargaining could not have taken place during this 5-day period and it must be held accountable for its inaction.

The record establishes that on receiving the initial notification by telephone about the layoffs on March 4, the Union immediately requested to negotiate about the decision to lay off employees and the effects of the layoffs in the same conversation, offering to meet on March 5 and 8. Additionally, the Union requested that the layoffs be postponed. All of these requests were met with unequivocal refusals by Respondent to bargain at that time. This leads me to conclude that the Respondent never had any intention to bargain about the layoff decision or its effect on employees before March 5. Thus, I find that Respondent violated Section 8(a)(1) and (5) of the Act by this conduct.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by stating to employees that if they selected the Union as their collective-bargaining representative it would treat the employees as badly as it treats its vendors, threatening employees that if they selected the Union as their collective-bargaining representative it could not control any employee layoffs and would not keep its commitment not to lay off employees, threatening employees that it would refuse future work for fear of strikes and threatening employees that all year, they would regret having selected the Union as their collecting-bargaining representative.

4. Respondent has not engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act when it laid off 10 employees on March 5, 1999.

5. Respondent, by laying off 10 employees on March 5, 1999, without giving adequate notice, and without affording the Union an opportunity to bargain in good faith over the layoff decision and its effects, has engaged in conduct violative of Section 8(a)(1) and (5) of the Act.

6. The unfair labor practices found to have been committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

It is recommended that Respondent be ordered to make whole, with interest, those unit employees who were laid off on March 5, 1999, for any loss of pay or other employment benefit suffered as a result of this unlawful unilateral action. Backpay should be computed in the manner set forth in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

ORDER

The Respondent, Ebenezer Rail Car Services, Inc., West Seneca, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees that if they selected the Union as their collective-bargaining representative, it would treat the employees as badly as it treats its vendors.

(b) Threatening employees that if they selected the Union as their collective-bargaining representative, it could not control any employee layoffs.

(c) Threatening employees that if they selected the Union as their collective-bargaining representative, it would not keep its commitment not to layoff employees.

(d) Threatening employees that during collective-bargaining negotiations with the Union, it would refuse future work for fear of strikes.

(e) Threatening employees that all year, they would regret having selected the Union as their collective-bargaining representative.

(f) Laying off its unit employees without first giving adequate notice of its intention to do so to the Union and affording the Union an opportunity to bargain in good faith over the decision and its effects.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.[9]

(a) Give notice to the Union before it implements any future economic layoff and give the Union the opportunity to bargain over that decision and its effects.

(b) Make whole, with interest, those unit employees who were laid off on March 5, 1999, for any loss of pay or other employment benefits suffered as a result of this unilateral action.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this order.

(d) Within 14 days after service by the Region, post at its facility in West Seneca, New York, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided

[9] The General Counsel's request in its posthearing brief for an Order requiring Respondent to bargain in good faith with the Union for the period required by *Mar-Jac Poultry Co.,* 136 NLRB 785 (1962), is rejected. In this regard, the subject case does not allege or involve negotiations concerning an initial term agreement. Accordingly, the remedy provided adequately addresses the 8(a)(1) and (5) violation of the Act found herein.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judg-

by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 1, 1999.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."